No. 92-1212

IN THE

# *Supreme Court of The United States*

OCTOBER TERM, 1992

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NO NAME VIDEO, LTD., ET AL.

*Petitioners,*

*VS.*

UNITED STATES OF AMERICA, ET AL.

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION**

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## TABLE OF CONTENTS


Page

Table of Authorities. . . . i

THERE IS A CONFLICT AMONG THE VARIOUS CIRCUIT COURTS OF APPEAL AS TO THE STANDARD TO BE APPLIED IN DETERMINING A PARTY'S RIGHT TO AN EVIDENTIARY HEARING IN A SUMMONS ENFORCEMENT ACTION . . . . 1

Conclusion . . . . . 6


## TABLE OF AUTHORITIES

### Cases


Alphin v. U.S., 809 F.2d 236 (4th Cir. 1987), cert denied, 480 U.S. 935 (1987) . 2, 3, 5

United States v. Harris, 628 F.2d 875 (5th Cir. 1980) . . . . . 4, 5

United States v. Kis, 658 F.2d 526, cert. denied, 455 U.S. 1018 (1982) . . 2, 5

United States v. Salter, 432 F.2d 697 (1st Cir. 1970) . . . . . 4, 5

United States v. Southeast First National Bank of Miami Springs, 655 F.2d 661 (5th Cir. 1981) . . . . . 2, 3, 5

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ON PETITION FOR WRIT OF CERTIORARI
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## ARGUMENT

### THERE IS A CONFLICT AMONG THE VARIOUS CIRCUIT COURTS OF APPEAL AS TO THE STANDARD TO BE APPLIED IN DETERMINING A PARTY'S RIGHT TO AN EVIDENTIARY HEARING IN A SUMMONS ENFORCEMENT ACTION

The Petitioners in their petition argued that there is a conflict among the various circuit courts of appeal with respect to when the recipient of an IRS administrative summons (the "summonee") is entitled to an

evidentiary hearing. Petitioners contend that some courts guarantee a summonee the right to an evidentiary hearing upon merely alleging that the IRS issued the summons for an improper purpose (the "Mere Allegation Standard"), while other courts require the production of particularized facts (the "Particularized Fact Standard"). In its brief in opposition, Respondent contends that Petitioners have erred and that there is no conflict among the circuits. (Resp at 5).

In Alphin v. United States, 809 F.2d 236 (4th Cir. 1987), cert. denied, 480 U.S. 935 (1987) the Fourth Circuit recognized the existence of the conflict, as is evident from the following passage:

> In order to be entitled to a hearing, the party challenging the summons must allege specific facts in its responsive pleadings, supported by affidavits, from which the court can infer a possibility of some wrongful conduct by the IRS. . . . "Mere allegations of bad faith will not suffice." [citing] United States v. Kis, 658 F.2d 526, 539 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) [(other supporting citations omitted)] But see, United States v. Southeast

> First National Bank of Miami Springs, 655 F.2d 661, 667 (5th Cir. 1981)([mere] allegation of improper purpose sufficient to trigger limited hearing). Alphin at 238.

In the Southeast case, a taxpayer urged the court to quash a summons issued to a third party recordkeeper on the ground that it was issued for an improper purpose (i.e. solely to gather evidence for a criminal prosecution). The taxpayer failed to provide any factual support for this allegation and asked the court for leave to conduct discovery. The court refused to permit the taxpayer to conduct discovery or to question the IRS agent at an adversary hearing. Southeast at 662-663.

On appeal the taxpayer argued that "the district court's refusal to provide an evidentiary hearing deprived him of a fair opportunity to substantiate [his] claim." In its response, the IRS argued that no hearing was required "because the taxpayer never offered facts in support of his bald,

conclusory allegations of improper purpose. . . ." The court rejected the IRS' argument and held that the taxpayer was entitled to a hearing. Southeast at 665.

In explaining its holding, the court adopted the logic set out in footnote 6 to United States v. Harris, 628 F.2d 875, 880 (5th Cir. 1980), which was cited by the Petitioners at pages 15 to 16 of their petition. "For these reasons, [the court held] that a [mere] allegation of improper purpose is sufficient to trigger a limited adversary hearing where the taxpayer may question IRS officials concerning the Service's reasons for issuing the summons." Southeast at 666.

In Harris, the court adopted a procedure to be employed in summons enforcement actions. Ironically, this procedure was recommended by the government in United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970).

> The Salter court recognized that the general solution to the taxpayer's need for discovery is for the district court to proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order. See, Harris at 881, citing Salter at 700.

The Seventh Circuit also recognized the conflict. Kis at 539-540.

In summary, the "Mere Allegation Standard" is applied in the First and Fifth circuits (See Salter, Harris and Southeast First National Bank) while the "Particularized Fact Standard" is applied in the Fourth and Seventh circuits (See Alphin and Kis).

In the instant case, the Petitioners offered two affidavits in support of their assertion that the IRS had issued the summons in bad faith, for the improper purpose of harassment. In one of the affidavits, Sanford Shapiro, the taxpayer and the target

of the criminal investigation, specifically alleged that the summons was issued in bad faith for the purpose of harassment. (Pet. App. 14, 28, 36-37). Under the "Mere Allegation Standard", Shapiro's affidavit is sufficient to entitle the Petitioners to an evidentiary hearing.

## CONCLUSION

For the foregoing reasons, Petitioners pray that this Court grant their Petition for Writ of Certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in United States of America and Special Agent W. Donald Bell v. No Name Video, Ltd. and Satterfield Inc., t/a Accounting Associates and/or MS Enterprise.

Respectfully submitted,

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